MOTION FILED

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IN THE

Supreme Court of the United States

October Term, 1975
No.75-260

L.N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRAIL TRANSPORTATION COMPANY and
TEAMSTERS FREIGHT TANK LINE AND
AUTOMOBILE INDUSTRY EMPLOYEES,
LOCAL UNION NO. 988,
Respondents

**On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND ANNEXED BRIEF OF THE AMERICAN JEWISH COMMITTEE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Jewish Committee hereby respectfully moves this Court for leave to file the accompanying brief *amicus curiae*. The consent of counsel for the petitioners and for the respondent union has been obtained. Consent of counsel for the respondent company was requested, but denied.

The American Jewish Committee is a national organization of approximately 40,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization, however, that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed, or national origin. For this reason, the American Jewish Committee has vigorously supported the extension of equal opportunity to all individuals. Specifically,

we have filed numerous briefs as *amicus curiae* in cases before this Court, as well as courts below, in opposition to discrimination based on race in education, housing, employment, public accommodations, and private clubs. While most of these cases have dealt with discrimination against black citizens, not all of them have, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974), which addressed discrimination in educational opportunity against Chinese-American public school students.

Petitioners will necessarily concentrate on demonstrating that they have made a claim of racial discrimination as this demonstration will have to be successful before this Court considers the question of whether or not a white person can seek judicial relief from such discrimination. The accompanying brief *amicus curiae* deals generally with this question and leaves to counsel for the parties the argument concerning the particulars of the instant case.

The lower courts in the instant case, in concluding that 42 U.S.C. § 1981 is inapplicable to whites, relied upon cases which support such a conclusion only by way of dicta. The recent case of *Hollander v. Sears, Roebuck and Co.*, 392 F. Supp 90 (D. Conn. 1975) which was decided two months before the appellate decision in the instant case was not considered. The *Hollander* court was the first court to review the legislative history of 42 U.S.C. § 1981 and found adequate support in the Congressional debates to conclude that white persons have standing to sue under the statute. In order to ensure that the reasoning and analysis of this case is considered by this Court, the American Jewish Committee has presented in its brief a lengthy excerpt from this case within the framework of the arguments presented to the *Hollander* court.

In addition, the American Jewish Committee finds it appropriate to bring to this Court's attention a district court holding that a white person does not have standing to sue under 42 U.S.C. §§ 2000e *et seq*. This issue of a white person's standing to sue under this statute was properly not reached by the lower courts in the instant case but will be before this Court for consideration if this Court finds a claim of racial discrimination has been made. The accompanying brief presents

portions of the Congressional debates which clearly demonstrate that a white person has standing to sue under 42 U.S.C. §§ 2000 e *et seq*. for consideration by this Court in the event this Court reaches this issue.

The underlying concern of the American Jewish Committee is that under the law there should be no differentiation based on race and that the law should not be construed to apply to one race and not another. This concern has a constitutional dimension. The accompanying brief therefore presents the argument that it would be violative of due process to construe either 42 U.S.C. § 1981 or 42 U.S.C. §§ 2000 e *et. seq.* as providing only a cause of action for non-whites.

The instant case may be decided upon a finding that the petitioners have not made a claim of racial discrimination. An adequate presentation of the arguments concerning this facet of the case can be made by counsel for the parties. The *amicus curiae* brief presents the full scope of the issues which the American Jewish Committee feels may not be presented or may be inadequately presented by counsel for the parties and which will be reached by this Court if it finds a claim of racial discrimination in the instant case.

For the foregoing reasons, the American Jewish Committee respectfully requests that this motion be granted.

December 15, 1975

Respectfully Submitted,

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IN THE

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BRIEF OF
THE AMERICAN JEWISH COMMTTEE
AS AMICUS CURIAE

This brief is submitted by the undersigned *amicus curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

INTERESTS OF THE AMICUS CURIAE

The interest of the *amicus* is set forth in the attached motion for leave to file.

OPINION BELOW

The opinion of the Court of Appeals is reported at 513 F.2d 90.

STATEMENT OF THE CASE

Petitioners, discharged from employment after being accused by respondent company of having misappropriated certain of respondent company's property, initiated an action under 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981 in the United States District Court for the Southern District of Texas, claiming that they were discharged on account of their race, which is white, because a similarly accused black employee was not discharged. Judgment was entered against the discharged employees who appealed.

The Court of Appeals held that 42 U.S.C. § 1981 "confers no actionable rights upon white persons," and finding that petitioners had failed to allege that they were falsely charged, held "that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C. § § 2000e *et seq*."

SUMMARY OF ARGUMENT

The Court of Appeals held that the plaintiffs (the petitioners here) could not claim that they were discriminated against on account of their race based upon the allegations in their complaint. Although the court also held that white persons cannot sue under 42 U.S.C. § 1981, this holding is merely dictum. Even if the plaintiffs were not white, their claim under 42 U.S.C. § 1981 would have been dismissed because, in order to maintain an action under the statute, it is necessary to make a claim of racial discrimination.

If this Court finds that a claim of racial discrimination cannot be based upon the allegations in the complaint, there will be no basis upon which to decide whether or not a white person can sue under 42 U.S.C. § 1981. On the other hand, if this Court were to find that a valid claim of racial discrimination has been made, the question of whether or not a white person can sue under the statute would be properly before this Court.

The courts that have stated that whites cannot sue under 42 U.S.C. § 1981 seem to have assumed that the phrase "as is enjoyed by white citizens" contained in the statute indicates that only non-whites were to be protected under the statute. The legislative history of the statute demonstrates, though, that the phrase does not function to exclude white persons from the protection of the statute, but to ensure that protection under the statute extends only to persons denied the rights conferred on the basis of race.

Although the lower courts in the instant case did not need to consider the question of whether or not a white person can sue under 42 U.S.C. § § 2000e *et seq*. since the courts found no claim of racial discrimination, the question ought to be cor.sidered by this Court if a claim of racial discrimination is found since a district court has held that a white person cannot sue under this act. This holding should be expressly overruled since the legislative history of the act demonstrates that although the act was passed in response to the denial of equal opportunity to non-whites, the Congress intended that the act would protect whites, as well as non-whites, from racial discrimination in the areas covered under the act.

If this Court were to find that either 42 U.S.C. § 1981 or 42 U.S.C. § § 2000 e *et seq*., or both prohibit racial discrimination against non-whites, but not against whites, enforcement of either statute would unjustifiably discriminate against whites so as to be violative of due process. The proper course for this Court to follow would be to interpret the statutes so as to provide standing for whites, and thereby, avoid having to render the statutes invalid.

ARGUMENT

POINT I

THE PHRASE "AS IS ENJOYED BY WHITE CITIZENS," AS PART OF 42 U.S.C. § 1981, DOES NOT FUNCTION TO EXCLUDE WHITE PERSONS FROM THE PROTECTION OF THE STATUTE, BUT TO ENSURE THAT PROTECTION UNDER THE STATUTE EXTENDS ONLY TO PERSONS DENIED THE RIGHTS CONFERRED ON THE BASIS OF RACE.

The Court of Appeals in this case affirmed the District Court's holding that 42 U.S.C. § 1981 (hereinafter "Section 1981") confers no actionable right upon white persons. The appellate court based its affirmance on four cases which, actually, provide no support for such a conclusion, except, perhaps, by way of dicta. These cases do not involve claims of racial discrimination, as is involved in the instant case, and therefore, support only the conclusion that a white person who suffers no detriment due to his race does not have standing to sue under Section 1981.

In *Perkins v. Banster*, 190 F.Supp. 98 (D. Md. 1960), aff'd 285 F.2d 426 (4th Cir. 1960) the court states: "Perkins has explained the rather unclear provisions of the complaint and has indicated that his claims are for false arrest or false indictment or malicious prosecution or denial of due process, and also for slander." 190 F.Supp. at 99. The case was dismissed because the court found the action to be "frivolous." 190 F.Supp. at 100. In *Kurylas v. U.S. Department of Agriculture*, 373 F.Supp. 1072 (D. D.C. 1974), "[t]he Court concludes that the plaintiff's allegations of discrimination due to his national origin is insufficient to sustain a cause of action under § 1981 . . ." 373 F.Supp. at 1076. The court in *Van Hoomissen v. Xerox Corp.*, 368 F.Supp. 829 (N.D. Cal. 1973) followed the reasoning in *N.O.W. v. Bank of California*, 5 E.P.D., ¶ 8510 (N.D. Cal. 1973) that " . . . the Court cannot allow a white plaintiff standing under Section 1981 when he has suffered a

deprivation which was not the result of his race." 368 F.Supp. at 839. The plaintiff in *Van Hoomissen, supra*, was only " . . . suing defendants for various alleged acts of retaliation . . . The alleged retaliation was in response to plaintiff's asserted attempts to change the hiring policy of Xerox, which he believe[d] discriminate[d] against Mexican Americans . . ." 368 F.Supp. at 831. In *Ripp v. Dobbs Houses, Inc.*, 366 F.Supp. 205 (N.D. Ala. 1973), the court does state that " . . . a white plaintiff cannot rely on 42 U.S.C. § 1981 . . ." 366 F. Supp. at 211, but this is merely dictum. Even if the plaintiff in *Ripp* had been non-white, the case would have been dismissed because, as the court found, the " . . . plaintiff makes no complaint that he has suffered any detriment on account of his race." 366 F.Supp. at 208. The plaintiff was attempting to represent other employees who were, allegedly, subjected to discrimination.

The same analysis can be applied to the other three cases relied upon by the appellate court in the instant case. Even if the plaintiffs in those cases were non-white, those cases would have been dismissed because the necessary claim of racial discrimination had not been made. The plaintiffs in the instant case have alleged that they were discriminated against because of their race.

The appellate court, though, did not find the allegation of racial discrimination sufficient. In its discussion of the applicability of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (hereinafter "Title VII") to the plaintiffs' claim, the court found that the plaintiffs could not claim that they were discriminated against on account of their race based upon the allegations made in their complaint. If this legal finding is correct, then even if the plaintiffs were non-white, the court would have dismissed their claims under Section 1981. Therefore, the court's statement that whites cannot sue under Section 1981 is merely dictum. If this court finds that a claim of racial discrimination cannot be based upon the allegations in the complaint, there will be no basis upon which to decide whether or not a white person can sue under Section 1981. On the other hand, if this Court were to find that a valid claim of racial discrimination has been made, the

question of whether or not a white person can sue under Section 1981 would be properly before this Court.

The courts that have stated that whites cannot sue under Section 1981 seem to have assumed that the phrase "as is enjoyed by white citizens" contained in the statute indicates that only non-whites were to be protected under the statute. This assumption was demonstrated to be incorrect in *Hollander v. Sears, Roebuck and Co.*, 392 F.Supp. 90 (D. Conn. 1975) where the court found that the legislative history of § 1 of the Civil Rights Act of 1866,[1] from which Section 1981 was ultimately derived makes it " . . . quite clear that § 1981 should not be read as only providing a cause of action for non-whites." 392 F.Supp. at 94. The *Hollander* court reached this conclusion through the following analysis:

> As originally passed by the Senate, the bill which eventually became § 1 of the 1866 Act did not contain the questioned phrase. It was added by amendment in the House. *See Georgia v. Rachel*, 384 U.S. 780, 791 . . . (1966). During the Senate debates on that original bill, Senator Lyman Trumbull of Illinois, the floor manager, made it quite explicit that the bill was intended to protect the rights of whites, as well as blacks. In response to a charge by one of the bill's opponents that it was

[1] Act of April 9, 1866, c. 31, §1, 14 Stat. 27, re-enacted by § 16 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 16, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981 and 1982.

Section 1 provided in relevant part:

> "[A]ll . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

outrageous to provide federal protection for blacks that had never been accorded whites, Senator Trumbull stated:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?
>
> Cong. Globe, 39th Cong., 1st Sess. 599 (1866).

Of course, this statement was made before the House amended the bill to include, *inter alia*, the phrase "as is enjoyed by white citizens." However, when the bill was resubmitted to the Senate for consideration of the House amendments, the following colloquy between Senator Trumbull and Senator Van Winkle of West Virginia:

> Mr. VAN WINKLE. There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words "and such citizens." As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have

the same right to make and enforce contracts," &c., "as is enjoyed by white citizens." It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.

Mr. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superfluous. *I do not think they alter the bill.* I think the bill would be better without them, but they have been adopted by the House of Representatives. *We did not think they altered the meaning of the bill*; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and *as in the opinion of the committee which examined this matter they did not alter the meaning of the bill*, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it. (Emphasis added). Cong. Globe, 39th Cong., 1st Sess. 1413 (1866).

Without further debate, the amendment was approved by the Senate and ultimately the entire bill, as amended, was passed. Thus, the history of this legislation in the Senate clearly reflects an understanding that the act was to protect the rights of all citizens notwithstanding the amendatory language inserted by the House. *Hollander v. Sears, Roebuck and Co., supra*, 392 F.Supp. at 92-93.

The reason for the addition of the phrase given in the House by James F. Wilson of Iowa, the bill's floor manager was that " . . . it was thought by some persons that unless these qualifying words were incorporated in the bill, [the rights conferred] might be extended to all citizens, whether male or female, majors or minors." Appendix to Cong. Globe, 39th Cong., 1st Sess. 157 (1866). The phrase was intended only "to emphasize the racial character of the rights being protected."

Georgia v. Rachel, 384 U.S. 780 at 791 (1966). In other words, the phrase was added to ensure that protection under the statute extended only to persons denied the rights conferred on the basis of race and not to exclude white persons from the protection of the statute.

The court in *Kentucky v. Powers*, 139 F. 452 at 495 (Cir.Ct. E.D.Ky. 1905), rev'd 201 U.S. 1 (1906) provided the following analysis:

> Section 1977 [now 1981], so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons. The persons on whom it confers rights are 'all persons within the jurisdiction of the United States.' It is only when it comes to define the rights which the section confers that they are referred to as such 'as is enjoyed by white citizens.' (dictum)

This analysis of the language of the act should be sufficient, in and of itself, to demonstrate that Section 1981 protects whites, as well as non-whites. As the legislative history fully supports this analysis, this Court should hold that whites have the right to sue under Section 1981.

POINT II

ALTHOUGH 42 U.S.C. §§2000e ET SEQ. WAS PASSED IN RESPONSE TO THE DENIAL OF EQUAL OPPORTUNITY TO NON-WHITES, THE CONGRESS INTENDED THAT THE ACT WOULD PROTECT WHITES, AS WELL AS NON-WHITES, FROM RACIAL DISCRIMINATION IN THE AREAS COVERED UNDER THE ACT.

Although the lower courts in the instant case did not need to consider the question of whether or not a white person can sue under Title VII since the courts found no claim of racial discrimination, the question ought to be considered by this Court if a claim of racial discrimination is found since a district

court has held that a white person cannot sue under Title VII. The court in *Haber v. Klassen*, 10 FEP Cases 1446 at 1447 (N.D. Ohio 1975) dismissed the case of a white plaintiff stating that " . . . the discrimination these statutory provisions were designed to eliminate were aimed at racial minorities . . ."[2]

Although the *Haber* court quoted from this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), it completely disregarded this Court's statement that "[d]iscriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed." 401 U.S. at 431. This Court's interpretation of Congressional intent is adequately supported by the debates.

Although Title VII was passed in response to the denial of equal employment opportunity for minorities, the Congress was not unaware of discrimination against whites. On April 6, 1964 Senator Holland quoted in Congress from an interview by *U.S. News and World Report* of a black businessman who owned and operated a business with annual gross sales of $10 million and which had 600 employees:

> *"Question*: Would you say, then, that racial discrimination is found among all races?
> *Answer*: It is a universal human trait – and people use it, if they can do so at a profit. When it becomes unprofitable they forget it. Here in our organization, it pays the white people not to discriminate against the Negro, and they don't. But the Negroes will discriminate against the white people because they are trying to get the white people out of some of the well-paying jobs and put Negroes in them." 110 Cong. Rec. 7017 (April 6, 1964)

Furthermore, many members of Congress were concerned that whites might be discriminated against as a result of an

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[2] The statutory provision involved in *Haber v. Klassen, supra*, is 42 U.S.C. §2000e-16(a) which reads in relevant part: "All personnel actions affecting employees . . . in the United States Postal Service . . . shall be made free from any discrimination based on race."

employer's efforts to comply with the requirements of Title VII. Senator Clark, one of the two floor managers of the Civil Rights Act of 1964 stated in response to this concern that the Equal Employment Opportunity Commission (hereinafter "EEOC") " . . . has a clear mandate to engage in widespread educational and promotional activities to encourage understanding and acceptance of the policy of the act, including *the obligation not to discriminate against whites.*" (Emphasis added) 110 Cong. Rec. 7218 (April 8, 1964). The EEOC, which was created under Title VII and empowered to investigate charges of discrimination and to determine if reasonable cause exists to believe that the charge is true, has recognized that an employer has such an obligation by finding in a recent case reasonable cause to believe that an employer and employment agency violated Title VII when, because the employer requested only referral of minority group applicants the employment agency failed to act on an application submitted by a white individual. *EEOC Decision 75-268*, 10 FEP Cases 1502 (1975). In another decision the EEOC found reasonable cause to believe that the respondent violated Title VII by failing to rehire a white professor. *EEOC Decision 74-106*, 10 FEP Cases 269 (1974).

In view of the above, the *Haber* court's holding that a white person is not protected under Title VII is clearly erroneous. Therefore, this Court should expressly overrule this holding if a claim of racial discrimination is found in the instant case and it becomes necessary to consider whether or not a white person can sue under Title VII.

POINT III

ENFORCEMENT OF A STATUTE THAT PROHIBITS RACIAL DISCRIMINATION AGAINST NON-WHITES BUT NOT AGAINST WHITES WOULD UNJUSTIFIABLY DISCRIMINATE AGAINST WHITES SO AS TO BE VIOLATIVE OF DUE PROCESS.

In *Schneider v. Rusk*, 377 U.S. 163 at 168 (1964), this Court stated that " . . . while the Fifth Amendment

contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling v. Sharpe*, 347 U.S. 497, 499 [1954]." In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court followed this reasoning and applied the analytic techniques developed in Fourteenth Amendment equal protection cases to a claim arising under the due process clause of the Fifth Amendment.

Classifications based upon race, being inherently suspect, must be subjected to close judicial scrutiny. It is evident, though, that even under a traditional rational-basis analysis, a statute prohibiting racial discrimination against members of one race, while not providing the same protection against members of another race, would have to be held invalid. There can be no constitutional justification for such invidious discrimination. The proper course for this Court to follow would be to interpret the statutes so as to provide standing for whites, and thereby, avoid having to render the statutes invalid.

CONCLUSION

The legislative history of both Section 1981 and Title VII compel a holding that whites, as well as non-whites, are protected against racial discrimination by these statutes. Due process considerations necessitate such a holding if the statutes are not to be held invalid.

For the reasons set forth herein, the decision below should be reversed.

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December 15, 1975